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No. 368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY P. MILLER, INC. and
NEW AMSTERDAM CASUALTY CO.,
Petitioners

v.

WALTER S. KOZDRANSKI CO., INC.,
AMERICAN HOUSES, INC.,
RAY BURROUGHS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	4
REASONS FOR GRANTING THE WRIT	6
(1) The Validity of the Liens	6
(2) The Disputes Clause	12
(a) The disputes clause requires resort to the Contracting Officer as an indispensable prerequisite to suit against the general contractor	14
(b) The issues under the disputes clause are to be settled by federal, not state, law	16
CONCLUSION	17
APPENDIX A, Order of Appellate Division	18
APPENDIX B, Order of Court of Appeals	20

TABLE OF CITATIONS

Cases

Autrey v. *Williams & Dunlap*, 185 F.Supp. 802 (W.D. La. 1960)	7
Gypsum Contractors, Inc. v. *American Surety Co.*, 37 N.J. 315, 181 A.2d 174 (1962)	7
Inland Empire Builders, Inc. v. *Washington*, No. 849, O.T. 1963	8
Lasley v. *United States*, 285 F.2d 98 (5th Cir. 1960)	7
United States v. *Fort George G. Meade Defense Housing Corp.*, 186 F.Supp. 639 (D. Md. 1960)	7
United States v. *Harrison & Grimshaw Constr. Co.*, 305 F.2d 363 (10th Cir. 1962)	7

Page

United States v. *Munsey Trust Co.*, 332 U. S. 234 (1947) 7
United States v. *Progressive Contractors, Inc.*, 196 F. Supp. 171 (D.N.Dak. 1961) 7
United States v. *Taylor*, No. 20516, —— F.2d ——, June 22, 1964 16
Wymard v. *McCloskey & Co.*, 292 F.2d 839 (3d Cir. 1961), *affirming* on the opinion of the District Court, 190 F.Supp. 420 (E.D.Pa. 1960) 14

Other

H. Rept. No. 2363, 84th Cong. 2d Sess. (1956) 8
Capehart Act, 42 U.S.C. § 1594 ..... 2, 7, 8, 9, 10, 12
Miller Act, 40 U.S.C. § 270b 3, 11, 12

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Petitioner Anthony P. Miller Co. is a construction contractor, and petitioner New Amsterdam Casualty Co. is Miller's surety. Petitioners pray that a writ of certiorari issue to review the final judgment of the Appellate Division, Fourth Judicial Department, Supreme Court, State of New York.

OPINIONS BELOW

The Niagara County court rendered an opinion, unreported, which appears at p. 19 of the printed record

(ten copies of which were furnished this Court). Neither the Appellate Division nor the Court of Appeals rendered any opinions; their orders appear *post*, Appendices A and B.

JURISDICTION

Judgment against petitioners in the county court was entered on August 24, 1962. The Appellate Division affirmed without opinion on December 12, 1963. The Court of Appeals denied leave to appeal on April 30, 1964. This Court granted an extension of time in which to file this petition to August 10, 1964. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether housing built pursuant to the Capehart Act is a "public work" so as to be immune from subcontractors' liens, where the housing is built for the federal government, on federal land, pursuant to a contract of the federal government, where title to each house passes to the United States on completion and as progress payments are made, and where the liens are filed after the project is virtually completed, and where bonds and suit thereon in the federal court, as contemplated by the Miller and Capehart Acts, constitute the complete and sole remedy.

2. Whether subcontractors on a Capehart project, who have agreed that their exclusive remedy for disputes shall be through the standard government disputes machinery, are entitled to proceed in a state court without resort to said machinery, and whether the disputes clause raises an issue of federal law.

STATUTES INVOLVED

The Capehart Military Housing Act, 42 U.S.C. § 1594 (a):

"(a) Contract provisions; competitive bids.

The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41."

The Miller Act, 40 U.S.C. § 270b(b):

"Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to

be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit."

STATEMENT

On August 8, 1958, petitioner Anthony P. Miller, Inc., became the prime contractor on a $4,762,000 contract with the Air Force for construction of 290 Capehart housing units at Niagara Falls Air Force Base, New York. (R. 19) The three respondents were subcontractors under the prime contract; respondent Kozdranski was an excavator, respondent American Houses was a prefabricator of houses, and respondent Burroughs was a roofer. (R. 62, 71, 73) The Air Force accepted part of the project in January, 1960, and the rest in May, 1960. (R. 685)

Various disputes arose from the project between petitioner Miller and the three respondents. For one example, Miller had debited Kozdranski the cost of repairing various property which Miller claimed Kozdranski had damaged; Kozdranski claimed that the property damage was not his fault. For another example, Miller had debited American Houses for the cost of remedying material delivered by American Houses and rejected as defective by the Air Force; American Houses denied that it had furnished defective materials. For another example, the Air Force had rejected 60 roofs installed by Burroughs, and Burroughs claimed he was entitled to be reimbursed by Miller for part of the cost of replacing them.

In February, 1960, without any effort to invoke the contract disputes machinery, or to sue on the bond provided by petitioner under the Capehart and Miller Acts, Kozdranski, American Houses and Burroughs filed me-

chanics' liens against the project property, even though it was federal property. (R. 48, 90, 99) Rather than hold up Air Force acceptance of the last part of the project pending removal of the cloud on title, Miller voluntarily had the liens superseded by bonding them off. (R. 50, 91, 100) Petitioner New Amsterdam furnished the bonds. This did not serve to validate the liens if they were initially invalid.

Despite the fact that he was fully protected by petitioner's bond under the Capehart and Miller Acts (upon which suit would have to be filed in the United States District Court), in September, 1960, Kozdranski commenced an action in the state court to foreclose the liens. (R. 2) Under the New York lien laws, this required the bringing in as parties the other lienors, American Houses and Burroughs. All three then demanded judgment on the liens. (R. 56, 93, 101) The action was tried before the Niagara County court in April, 1962. (R. 119-124) The court rendered a decision adjudicating the various claims of the parties, allowing practically all of the many claims of the respondents, large and small, strong and weak, and enforcing the liens. (R. 19-41) Miller and New Amsterdam appealed to the Appellate Division, which affirmed without opinion. (Appendix A) Motions for leave to appeal to the Court of Appeals were denied by the Appellate Division and the Court of Appeals. (Appendix B) A stay of execution was sought from this Court, and denied July 13, 1964.

Petitioner Miller then paid respondents the amounts adjudicated in their favor, including costs and interest, totalling $117,625.97, and now brings this petition for writ of certiorari.

Two federal questions of importance were erroneously decided by the county court, and affirmed by the Appellate Division: it was held (1) that Capehart housing projects

are not public works, and are therefore subject to laborers' and materialmen's liens, and (2) that respondents could recover despite failure to follow the federal contractual disputes machinery, and that provision for such disputes settlement in the subcontract raised no federal question.

REASONS FOR GRANTING THE WRIT

There is a conflict among the circuits and with the decision below as to whether a Capehart housing project is a "public work" so as to be immune from subcontractors' liens. There is also a conflict between the decision below and that of one of the circuits as to whether a subcontractor under a Capehart Act housing contractor is bound by the disputes clause of his contract to seek the decision of the Contracting Officer as a necessary prerequisite to suit against the prime contractor, and also as to whether the federal requirement of such resort constitutes a federal question binding upon the state court. The questions are of general public importance; for if the contract-disputes-settlement provision required by federal law and incorporated in all federal construction projects—which have run to untold billions of dollars of cost to the federal government—can be nimbly avoided by suit in a state court without availing one's self of the federally-provided relief, then costs of contracts are going to be greatly increased as prime contractors strive to cover the flanking attack with additional allowances in their bids.

(1) The Validity of the Liens

The trial court dismissed the issue of lien validity without discussion or citation as follows (R. 19):

> "The project, while constructed for the Air Force, was built under the Capehart Act and was therefore technically not a public improvement."

The issue was argued to the Appellate Division, see Appellant's Brief, pages 45, 46 and 99, which affirmed without opinion. The United States Attorney had raised the question at the outset in an answer filed for the two dummy U. S. corporations (R. 79-81), demanding that the project premises be declared "free and clear of any mechanics' lien or other interest of the plaintiff."

There is a flat conflict among the circuits and with the decision below, as to whether a Capehart housing project is a "public work" so as to be immune from subcontractors' liens. See, on the one hand, *Lasley* v. *United States*, 285 F.2d 98 (5th Cir. 1960), holding that Congress considered that a Capehart project is a "public work." To the same or similar effect, see *United States* v. *Progressive Contractors, Inc.*, 196 F.Supp. 171 (D.N.Dak. 1961); *United States* v. *Fort George G. Meade Defense Housing Corp.*, 186 F.Supp. 639 (D.Md. 1960); *Autrey* v. *Williams & Dunlap*, 185 F.Supp. 802 (W.D.La. 1960); *Gypsum Contractors, Inc.* v. *American Surety Co.*, 37 N.J. 315, 181 A.2d 174 (1962). To the contrary, holding that a Capehart project is not a "public work" is *United States* v. *Harrison & Grimshaw Constr. Co.*, 305 F.2d 363 (10th Cir. 1962), cert. den., 371 U.S. 920.

It is elementary that laborers' and materialmen's liens cannot be filed against "public works."[1] Yet, the property involved here, a Capehart housing project, was a "public work."[2] Therefore the liens were void, and the Niagara County court had no power or jurisdiction to enforce them.

The Capehart Act was enacted in 1955,[3] "to provide for the construction of urgently needed housing [for mili-

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[1] *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 241 (1947).

[2] *Lasley* v. *United States*, 285 F.2d 98 (5th Cir. 1960).

[3] 69 Stat. 651, 42 U.S.C. § 1594.

tary personnel] on lands owned or leased by the United States. . . ." [4] While conceding the advantages of the use of appropriated funds, Congress "recognized that budgetary considerations would not permit the expenditure in 1 or 2 fiscal years of the sums needed", and accordingly provided for "the utilization of private mortgage capital to be repaid from quarters allowances of eligible service personnel." [5]

The usual procedure (and the procedure in this case) is that the government on the basis of competitive bids selects a contractor to build a housing project. The contractor creates a dummy corporation called the "mortgagor-builder" (in this case, there were two dummies—Niagara Falls A.F.B. Housing, Inc., and Niagara Falls A.F.B. Housing No. Two, Inc.), and places all of the stock in escrow for the government. The government then leases its land to the dummy. The dummy then borrows money from private lending sources, and pays the contractor during construction. The dummy's note is guaranteed by the government, and the government is the one who actually repays the loan. Congress could have selected other ways to borrow private money, but for reasons of its own chose the dummy system described.

The U. S. Justice Department has described the Capehart housing system to this Court as follows: [6]

> "In order to provide Government-owned military housing as expeditiously as possible and without including the full cost of construction in the current budget, in 1955 Congress passed the Capehart Act

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[4] 42 U.S.C. § 1594(a).

[5] H. Rept. No. 2363, 84th Cong. 2d Sess. (1956); 1956 U.S.C. Cong. & Adm. News pp. 4509, 4546.

[6] Memorandum for the United States in *Inland Empire Builders, Inc.* v. *Washington*, No. 849, O.T. 1963, U.S. Supreme Court, pp. 2, 4, 5 (appeal dismissed, June 1964).

(69 Stat. 646, *et seq.*) authorizing a method of financing military housing through private lending facilities. See S.Rep.No. 231, 85th Cong., 1st Sess., p. 26 *et seq.* The heart of the system is simple and involves only three parties: the United States, the contractor, and the lending institution which finances the construction. The contractor is paid an amount agreed upon with the government for building to the government's specifications. This amount is advanced by the lending institution, which is, in turn, repaid by the government.

"Neither the contractor nor the lending institution has any interest in the further refinements and complications which are superimposed on this basic framework solely for governmental purposes. The government requires the contractor to create a fourth party—a corporation whose stock is initially issued to the contractor, then placed in escrow for the United States. . . .

". . .

". . . The government obtains from the contractor title and the right to possession of the housing; there is no time when the mortgagor-builder corporation owns or has the right to use the housing which the State has said it purchased. . . .

". . .

"These facts establish that the United States, not the mortgagor-builder corporation, is the purchaser of Capehart housing. . . . It [mortgagor-builder] is, in short, a government instrumentality."

In other words, the Housing Contract herein involved was really a contract between the government and Miller, and the terms of the Contract leave no question of this. (Exh. MA-1) The bids were let by the Air Force; Miller was awarded the contract by the Air Force; the Air Force was a signator to the contract; Miller was required to furnish a bond acceptable to the Air Force; each hous-

ing unit was to be turned over to the Air Force upon availability for occupancy; inspection and acceptance of the housing was to be by the Air Force; the contract was to be administered by an Air Force Contracting Officer; the Air Force Contracting Officer had power to require the firing of "incompetent" or "insubordinate" employees of Miller; the Air Force Contracting Officer had final say over all disputes (subject to appeal to the head of the Department or his representative); Miller was to apply to the Air Force Contracting Officer for each payment; and title to material and work covered by progress payments vested in the Air Force. The standard government clauses were attached to the contract (no contingent fees, buy American, convict labor, 8-hour laws, etc).

At the time the liens were filed, the project was substantially completed; one section had been accepted by the Air Force, and acceptance of the other section was imminent. (R. 685) In other words, the liens did not purport to apply to raw material stored in the area, but to an all-but-completed military housing project.

The land on which the houses were built was federally owned before the project was begun, as contemplated by the Capehart Act.[7] At the time the contract was entered into the lands were leased to the dummy, so that the government owned the fee, and its dummy owned the leasehold. As to the houses themselves, "title to all material and work covered by progress payments made shall thereupon vest in the Department [i.e., the United States] . . . ."[8] As noted above, when the liens were filed the work was virtually completed, and title to the property described in the liens was in the United States.

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[7] 42 U.S.C. § 1594(a).

[8] Par. 14(c) of the Housing Contract herein involved, No. AF 30(617)-270.

This provision appears also in the leases between the United States and the dummy corporations (not in the record), which contained the following provision:

> "That the buildings and other improvements, including all items required to be furnished the Project in accordance with the Drawings and Specifications shall be and become real estate and part of the leased premises and property of the United States; provided, however, that this condition shall not apply to facilities erected by municipalities or public utility companies on the leased premises for the purpose of furnishing utility services to the project."

Aside from the invalidity of any liens, the respondents had agreed not to file any liens. The Housing Contract provided that

> "(13) The eligible builder [Miller] hereby agrees that no mechanics' liens or other claims shall be filed or maintained by it against the said buildings and improvements and real estate appurtenant thereto for or on account of any work or labor done or materials furnished under this Housing Contract or otherwise, for, toward, in, under or about the erection and construction of the said buildings and improvements."

And the respondent subcontractors agreed to this no-lien clause, when they agreed to be "bound by, and shall severally comply with, all the terms and provisions of the Housing Contract . . . as far as applicable to this Subcontract . . . ." (Exhs. 23, A-A, B-A, quoted in Appellants' Brief in Appellate Div., pp. 12-13)

The prohibitions against liens, and the invalidity of any liens filed, work no hardship on the would-be lienor, for the prime contractor on a Capehart project, as in any other project involving a public work,[9] must file a bond

[9] The Miller Act, 40 U.S.C. § 270a, in recognition of the immunity of public works from laborers' and materialmen's liens, provides that before the letting of any government contract over $2,000 for

whose very purpose is to protect unpaid laborers and materialmen.[10] And petitioner filed such a bond. In other words, respondents' exclusive remedy in this case, and an ample remedy at that, was to sue on the bond in the U. S. District Court.[11]

(2) The Disputes Clause

There are conflicts with decisions of the United States Courts of Appeal, both as to (1) whether a subcontractor of a contractor under the Capehart Act is bound to resort to the Contracting Officer by a provision for finality of determinations of disputes by the Contracting Officer representing the United States; and (2) whether the interpretation of the disputes clause in the subcontract is to be decided under federal or state law.

As usual in a government contract, the Housing Contract contained a disputes clause, as follows:

> "8. Disputes.
>
> Except as otherwise provided in this Housing Contract, *any dispute concerning a question of fact arising under this Housing Contract* which is not finally decided by the Commissioner, which may be adjusted between the eligible builder and the Contracting Offi-

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the construction, alteration or repair of "any public building or public work of the United States," the contractor must furnish a bond "for the protection of all persons supplying labor and material" on the project.

[10] The Capehart Act as originally passed in 1955 did not expressly require a laborers-materialmen bond. Congress in 1956 amended the Capehart Act to provide that "Any such [housing] contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance within the provisions of section 270a of Title 40, and no additional bonds shall be required under such section." 42 U.S.C. § 1594(a).

[11] As provided in 40 U.S.C. § 270b(b).

cer and which is not in fact disposed of by agreement *shall be decided by the Contracting Officer*, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the eligible builder. Within 30 days from the date of receipt of such copy, the eligible builder may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the Department, and the decision of the head of the Department or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive; . . ." (Emphasis added)

This clause was incorporated into respondents' subcontracts as follows (Exhs. 23, A-A, B-A, quoted in Appellant's Brief in Appellate Div., pp. 12-13):

"3:01. No alterations shall be made in the work except upon the written order of the Eligible-Builder and the amount to be paid by the Eligible-Builder or allowed by the Subcontractor, by virtue of such alterations shall be stated in said order. Any dispute arising between the Eligible-Builder and the Subcontractor as to the amount to be paid or allowed, shall be determined in accordance with the Disputes Clause of the General Provisions of the Housing Contract, being Paragraph 8 thereof, and in the meantime the Subcontractor shall proceed with the work required under such order.

"13:01. In case of any dispute between the Eligible-Builder and the Subcontractor in regard to matters arising out of this Subcontract, other than the disputes hereinbefore referred to, the same shall be submitted to and decided by the Contracting Offi-

cer, in accordance with the Disputes Clause of the General Provisions of the Housing Contract, being Paragraph 8 thereof.

"13:02. The decision of the Contracting Officer unappealed from, and the decision of the head of the Department, or his duly authorized representative, upon appeal, shall each be, and hereby are each made, final and conclusive upon the parties to such dispute."

(a) *The disputes clause requires resort to the Contracting Officer as an indispensable prerequisite to suit against the general contractor.*

There is a flat conflict with the decision of the Third Circuit Court of Appeals decision in *Wymard* v. *McCloskey & Co.*, 292 F.2d 839 (3d Cir. 1961), *affirming* on the opinion of the District Court, 190 F.Supp. 420 (E.D.Pa. 1960). That case involved, as does this, a housing contract under the Capehart Act; it involved a basic disputes clause in the contract with the contractor and clauses in the subcontract of the subcontractor identical with those in this case. 190 F.Supp. at page 423. The Court held (190 F.Supp. at page 425), as follows:

"Kemmel [the sub-subcontractor] agreed in the subcontract to submit to the Contracting Officer all disputes between it and McCloskey [the subcontractor] arising under the subcontract, including disputes over the amount due from McCloskey for additional work performed by Kemmel under any changed specifications. (See Article XIII and Article III of the subcontract). This provision for arbitration by the Contracting Officer was a legally enforceable contractual provision, and under the law, Kemmel could not sue McCloskey in a court of law for any dispute arising under the subcontract until Kemmel had first exhausted the arbitration procedures provided for in the subcontract—including the procedure for appeal from the decision of the Contracting Officer."

As respondents have admitted in their opposition to the application for stay filed herein, "None of the respondents were ever parties to any disputes passed upon by the contracting officer . . . ." Respondents asserted that petitioners had never demanded that any disputes with respondents be submitted to the Contracting Officer; but no demand was necessary; it was mandatory and jurisdictional that respondents pursue their exclusive remedy under the contract, whether petitioners pointed this out to them or not.

Petitioner raised the question of exclusive remedy as to the disputes matter at trial. (R. 132-3, 140, 311-12, 425-6; and see 732-3, 793) As to two instances it was expressly passed on by the trial court (where unfavorable to petitioner). (R. 22-24) The county court opinion mentioned two appeals to the Contracting Officer which were taken on a question of rock removal and for additional fill by respondent Kozdranski (R. 22-24), in the latter instance resolved in Kozdranski's favor by the Armed Services Board of Contract Appeals. The county court allowed Kozdranski recovery on the item even though the Board's decision was pending on review in the Court of Claims, and even though the amount of the claim had not yet been established by the Contracting Officer. This demonstrates some of the difficulties which arise when a subcontractor seeks to avoid the required disputes machinery.

On all other items which were exclusively justiciable under the disputes machinery the county court ignored the fact that respondents had failed to invoke the disputes machinery.

Petitioners raised the disputes issue again before the Appellate Division, see petitioner's Brief 11-15, 29, 59-60, 117.

(b) *The issues under the disputes clause are to be settled by federal, not state, law.*

Perhaps influenced by his notion that the contract work here involved was not a "public improvement," the county court ignored throughout the federal precedents and decided the case as if it were ruled solely by New York law and, therefore, as if the disputes clauses of the prime and subcontracts were no part of the court's concern. Despite that the exclusive remedy of the disputes clause was raised throughout, as we showed above, respondents mirrored the same view of the trial court in their opposition to a stay which petitioner unsuccessfully sought from the Circuit Justice that ". . . at no time during the trial or on appeal was any federal question raised." (Opp. p. 2).

The holding below that the matter is governed by state law is in flat conflict with a recent decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Taylor*, No. 20516, —— F.2d ——, June 22, 1964. There the court held:

> "The government insists, however, that federal law applied to the interpretation of subcontracts executed under government contracts and that, under such law, administrative remedies must be exhausted before resort is made to the courts. They rely on *American Pipe & Steel Corp.* v. *Firestone Tire & Rubber Co.*, 292 F. (2) 640 (9th Cir. 1961). Here the court applied federal law to the interpretation of a subcontract under a federal contract since the area was one dominated by the sweep of federal statutes, the contracts were connected with national security, and, in this instance, a possible increase in the cost of national security was involved. The government is correct. The subcontract in this case would be interpreted by federal law under the sweeping command of the *Firestone* decision. It is not necessary, however, to paint with such a broad brush.

"The trial court erred in treating the disputes clause as an agreement to arbitrate which ousted the court of jurisdiction and was historically viewed with a jealous eye by the courts. The clause is an ordinary disputes clause and so far as possible should be treated as similar clauses in contracts between the government and its contractors . . . ."

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK

APPELLATE DIVISION
FOURTH JUDICIAL DEPARTMENT

WALTER S. KOZDRANSKI CO., INC.,
Respondent,

vs

ANTHONY P. MILLER, INC., and NEW AMSTERDAM CASUALTY COMPANY,
Appellants,

and

NIAGARA FALLS A.F.B. HOUSING, INC., ET AL.,
Respondents.

The defendants, Anthony P. Miller, Inc., and New Amsterdam Casualty Company, above named, having appealed to the Appellate Division, Fourth Judicial Department of the Supreme Court, from the Judgment entered in this action on the 27th day of August 1962 in the office of the Clerk of the County of Niagara and from a portion of an Order filed in the office of the Clerk of the County of Niagara on September 24, 1962, and the appeal having been heard at a term of the Appellate Division of the Supreme Court, Fourth Judicial Department, held at Rochester, New York on the 30th day of October, 1963 and an Order of said Appellate Division having been made and entered affirming said Judgment and said Order insofar as appealed from with costs of said appeal to the respondents, all the justices concurring,

NOW ON MOTION OF Rice, Rice, Hustleby & Chace, Attorneys for respondent Walter S. Kozdranski Co., Inc., Runals, Broderick, Shoemaker, Mathias & Rickert, at-

torneys for the respondent American Houses, Inc., and Paul J. Murphy, attorney for the respondent Ray Burroughs:

IT IS HEREBY ADJUDGED that the said Judgment and the said Order so far as appealed from be, and the same hereby are, affirmed in all things, and that the respondents herein recover of Anthony P. Miller, Inc., and New Amsterdam Casualty Company, the appellants herein the sum of $395.40, costs of said appeal, and that they have execution therefor.

/s/ Frank A. Woock
Niagara County Clerk

Dated: December 12, 1963

APPENDIX B

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Thirtieth day of April A. D. 1964.

Present, HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

4 Mo. No. 234

WALTER S. KOZDRANSKI CO., INC.,
Respondent,

vs.

ANTHONY P. MILLER, INC., ET AL.
Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

/s/ Garon Kimball
Deputy Clerk

* * * *

Office-Supreme Court, U.S.
FILED
SEP 9 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted]368

ANTHONY P. MILLER, INC. and
NEW AMSTERDAM CASUALTY CO.,
Petitioners,

v.

WALTER S. KOZDRANSKI CO., INC.,
AMERICAN HOUSES, INC.,
RAY BURROUGHS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF ON BEHALF OF WALTER S. KOZDRANSKI CO., INC., AMERICAN HOUSES, INC., AND RAY BURROUGHS, RESPONDENTS

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS.

PAGE

ARGUMENT:

I. Insufficiency of Petition 1

II. No Question of Substantial Public Concern is Presented 3

III. The Parties Effectually Waived any Disputes Clause Procedure 4

IV. An Independent State Ground Exists Which Fully Supports the Judgment Granted 6

V. The Equities Require Denial of the Petition .. 7

CONCLUSION 8

APPENDIX A, Affidavit of Frank G. Godson 9

CASES CITED.

American Locomotive Co. v. Chemical Research Corporation, 171 F. 2d 115 (C. A. 6th, 1948) *cert. den.* 336 U. S. 909 (1949) 5

Armstrong v. United States, 364 U. S. 40 (1960) 4

Durley v. Mayo, 351 U. S. 277 (1956) 7

E. I. duPont deNemours & Co. v. Lyles & Lang Const. Co., 219 F. 2d 328 (C. A. 4th, 1955), *cert. den.* 349 U. S. 956 (1955) 5

Fanderlik-Locke Co. v. United States, 285 F. 2d 939 (C. A. 10th, 1960) 4

Gold Plastering Co. Inc. v. 200 East End Avenue Corp., 282 App. Div. 1073, *aff'd* 307 N. Y. 668 (1954) 5

Mellon v. O'Neil, 275 U. S. 212 (1927) 2

Minneapolis-Honeywell Regulator Co. v. Terminal Construction Corp., 41 N. J. 500, 197 A. 2d 557 (1964) revising *Gypsum Contractors Inc. v. American Surety Co.*, 37 N. J. 315, 181 A. 2d 174 (1962) 7, 8

Stembridge v. State of Georgia, 343 U. S. 541 (1952) .. 7

United States v. Bregman Construction Corp., 256 F. 2d 851 (C. A. 7th, 1958) 5

PAGE

United States v. Continental Casualty Co., 305 F. 2d 794 (C. A. 8th, 1962), *cert. den.* 371 U. S. 922 (1962) 3
United States v. Harrison & Grimshaw Construction Co., 305 F. 2d 363 (C. A. 10th, 1962), *cert. den.* 371 U. S. 920 (1962) 3
United States v. Taylor, 333 F. 2d 633 (C. A. 5th, 1964) 5
Wymard v. McCloskey & Co., 190 F. Supp. 420 (E. D. Pa., 1960), *aff'd on opinion below*, 292 F. 2d 839 (C. A. 3rd, 1961) 4, 5

STATUTORY CITATIONS.

Capehart Act, 42 U. S. C. § 1594 ..... 3, 4
Miller Act, 40 U. S. C. § 270 ..... 3, 5, 8
New York Lien Law § 54 (McKinney's Consolidated Laws of New York Vol. 32) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 638

ANTHONY P. MILLER, INC. and
NEW AMSTERDAM CASUALTY CO.,
Petitioners,

v.

WALTER S. KOZDRANSKI CO., INC.,
AMERICAN HOUSES, INC.,
RAY BURROUGHS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF ON BEHALF OF WALTER S. KOZDRANSKI CO., INC., AMERICAN HOUSES, INC., AND RAY BURROUGHS, RESPONDENTS

I.

Insufficiency of Petition.

The petition herein fails to demonstrate compliance with either Rule 19, 1(a), or Rule 23, 1(f) of the Supreme Court Rules by setting forth any Federal question of substance decided by the state courts adverse to the decisions of this Court.

Contrary to the assertion of petitioners, neither the Supreme Court at Trial Term, the Appellate Division of the Supreme Court, nor the Court of Appeals of the State of New York were requested to or did pass upon any alleged infringement of the Federal constitution, treaties or statutes. At no time subsequent to the filing of the mechanic's liens herein, and prior to June 5, 1964, did petitioners or any other party move to vacate the liens or raise any question as to the jurisdiction of the state court to hear and determine these actions upon their merits. No motion was ever made on behalf of the petitioners either before or during the trial, or in the appellate courts, to dismiss these claims for want of state court jurisdiction, or because of a claimed invalidity of the liens.

Such contention never was advanced until after complete exhaustion of petitioners' rights in the New York courts. This is established by the words of petitioners' trial counsel. Printed as Appendix A is an affidavit of that counsel submitted in a futile attempt to secure a stay of execution subsequent to denial by the Court of Appeals of the State of New York for leave to appeal, in which he avers "that it had recently come to our attention" that jurisdictional questions existed (Appendix A, p. 15). In the fact of such concession, it is difficult to see how it can be claimed that any question arising under the Capehart Act, the Miller Act or the interrelation between them, could have been raised in or decided by the trial Court at first instance, or any appellate Court as required by Rule 23, 1(f) of this Court for grant of certiorari.

In the words of Mr. Justice Sanford in *Mellon v. O'Neil*, 275 U. S. 212, 214-215 (1927):

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court

of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. Whitney v. California, 274 U. S. 357, 360 71 L. ed. 1095, 1099, 47 Sup. Ct. Rep. 641; and cases cited. It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature.

II.

No question of substantial public concern is presented.

In both *United States of America for the use and benefit of Miles Lumber Co. v. Harrison & Grimshaw Construction Co.*, 305 F. 2d 363 (C. A. 10th, 1962), *Cert. denied* 371 U. S. 920 (1962) and *United States of America for the use and benefit of Robertson Lumber Co. v. Continental Casualty Co.*, 305 F. 2d 794 (C. A. 8th, 1962, *cert. denied* 371 U. S. 922 (1962), the provisions of the Miller Act, 40 U. S. C. § 270 (49 Stat. 794) were held not to be applicable to a housing project under the Capehart Act, 42 U. S. C. § 1594 (69 Stat. 646; 70 Stat. 1019; 70 Stat. 1109). In addition, in *Miles Lumber, supra*, the Circuit Court specifically held:

> "Those furnishing labor and materials during project construction may assert liens under state law against the property." (305 F. 2d at 366-367.)

In each of those cases an attempt to obtain review by this Court upon the ground of conflict between circuits was made by certiorari was nevertheless denied.

The procedure followed by the respondents herein in filing liens and prosecuting actions against the petitioners herein was entirely proper. The liens were filed against interests of private corporations then controlled by Miller

and did not purport to affect the interests of the United States.

That a Capehart project is not a "public work" is in accord with the decision of this Court in *Armstrong v. United States,* 364 U. S. 40, 42 (1960):

> "We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens."

The cessation by Congress in 1962 of further appropriations to finance Capehart Act projects warrants the assumption that little, if any, further litigation involving these projects will arise and that the public interest accordingly does not merit a grant of certiorari in this case by this Court.

III.

The parties effectually waived any disputes clause procedure.

The petition herein erroneously infers (p. 15) that respondent Kozdranski was a party to two appeals before the contracting officer. Kozdranski was not a party to these appeals. Neither Kozdranski, American Houses, nor Burroughs were parties to any appeals before the contracting officer.

Persuasive argument could be made that a contracting officer, as to disputes between a contractor and sub-contractor, is without jurisdiction. [*cf. Fanderlik-Locke Co. v. United States of America for the use of M. B. Morgan,* 285 F. 2d 939 (C. A. 10th, 1960), where the subcontractor was stated to have no standing before the contracting officer; *Wymard v. McCloskey & Co.,* 190 F. Supp. 420 (E. D. Pa.,

1960) *aff'd* on opinion below, 292 F. 2d 839 (C. A. 3rd, 1961), where the contracting officer refused to arbitrate such a dispute.] Such an argument is not essential to the determination of this issue as to Kozdranski, and no issue is presented by this record which would have involved either American Houses or Burroughs and the contracting officer (R. 35).

As between contractor and sub-contractor the contracting officer is at best an arbitrator, since no interest of the United States is impinged upon by a question involving breach of contract between those parties. It has long been settled that where the defendant pleads only to the merits in a suit for damages, such action constitutes a waiver of the right to arbitration. *American Locomotive Co. v. Chemical Research Corporation*, 17 F. 2d 115 (C. A. 6th, 1948) *cert. denied* 336 U. S. 909; *United States of America for the use and benefit of Frank A. Trucco & Sons Co. v. Bregman Construction Corp.*, 256 F. 2d 851 (C. A. 7th, 1958) (involving the Miller Act). Petitioners pled only to the merits and thereby waived any right to arbitration (R. 58-78; 104-106). See: *E. I. duPont deNemours & Co. v. Lyles & Lang Const. Co.*, 219 F. 2d 328 (C. A. 4th, 1955), *cert. denied* 349 U. S. 956 (1955) where it was held that resort to the standard disputes clause was waived by a plea to the merits and assertion of a counter-claim. Nothing contained in *United States v. Taylor*, 333 F. 2d 633 (C. A. 5th, 1964), cited by petitioners, is inconsistent with this for there the factual dispute was submitted to arbitration.

The law of the State of New York is in accord, *Gold Plastering Co., Inc. v. 200 East End Avenue Corp.*, 282 App. Div. 1073, *aff'd* 307 N. Y. 668 (1954).

Accordingly, the contention that resort to the disputes clause was a jurisdictional prerequisite to a suit by these sub-contractors is without merit.

IV.

An independent state ground exists which fully supports the judgment granted.

The complaint of the respondent Kozdranski and the answers and cross actions of the respondents American Houses and Burroughs, in substantially similar language, sought relief:

> "4(e) That if plaintiff shall fail, for any reason, to establish a valid lien herein, it recover judgment for such sums as are due it, or for which it might recover in an action on a contract, against defendant Anthony P. Miller, Inc." (R. 57-58, 94, 102.)

Such relief is specifically authorized by New York statute law. Section 54 of the New York Lien Law provides:

> "If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action."

The judgment entered (R. 9) granted such personal judgment and in fact, the opinion of the Trial Justice specifically limited a substantial portion of the Kozdranski claim to a personal judgment against Miller for breach of contract (R. 19).

There was a direct contractual relationship between each of the respondents and petitioner Miller (R. 47, 51, 53, 55, 88, 97-98) and, therefore, it cannot be disputed that each was entitled to sue Miller for breach of contract in the New York courts. Such relief was pleaded, demanded,

granted and upheld on appeal (R. 47-48, 51-52, 53-54, 55, 88-90, 97-99, 57-58, 94, 102, 28, 35, 40-41, 14-15; Petition 18-20).

Accordingly, the judgment sought to be reviewed is valid on state grounds, entirely independent of any asserted Federal question. Under those circumstances this Court has repeatedly held that it is without jurisdiction to review. *Durley v. Mayo*, 351 U. S. 277 (1956); *Stembridge v. State of Georgia*, 343 U. S. 541 (1952), and cases therein cited.

V.

The equities require denial of the petition.

The issues between the parties were accorded a full and fair hearing by the Supreme Court at trial term and were reviewed on appeal by the Appellate Division, Fourth Department, both upon the law and the facts and unanimously affirmed (R. 19-41, Petition 18-19). The New York Court of Appeals could perceive no error of law which required its review (Petition 20).

To hold that the exclusive remedy available to these respondents was by action on the Capehart bond would be to leave them without relief in view of the one year limitation for action contained therein, despite the unanimous opinion of the New York courts that the respondents were entitled to recover more than $100,000.00 as damages for breach of their contracts.

The New Jersey Supreme Court was recently confronted with a precisely similar situation in *Minneapolis-Honeywell Regulator Co. v. Terminal Construction Corp.*, 41 N. J. 500, 197 A. 2d 557 (1964), in which it specifically overruled its previous decision, cited by petitioners, in *Gypsum Con-*

tractors Inc. v. American Surety Co., 37 N. J. 315, 181 A. 2d 174 (1962), and held the Miller Act inapplicable.

It is respectfully submitted that the equities require that the respondents not be left without just compensation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK
SUPREME COURT—NIAGARA COUNTY

—o—

WALTER S. KOZDRANSKI CO., INC.,
Plaintiff,

vs.

ANTHONY P. MILLER, INC. and NEW AMSTERDAM CASUALTY COMPANY,
Defendants,

and

NIAGARA FALLS A. F. B. HOUSING, INC., NIAGARA FALLS A. F. B. HOUSING NO. TWO, INC., ALBERT AMATO ELECTRICAL CONTRACTING CORP., AMERICAN HOUSES, INC., RAY BURROUGHS, THE COMPTROLLER OF THE STATE OF NEW YORK, As trustee of the NEW YORK STATE EMPLOYEES RETIREMENT SYSTEM,
Defendants.

—o—

State of New York,
County of Erie,
City of Buffalo. } ss.:

FRANK G. GODSON, being duly sworn, deposes and says:

That he is an attorney associated with the firm of Smith, Murphy & Schoepperle, attorneys for the defendants Anthony P. Miller, Inc. and New Amsterdam Casualty Company in the above entitled action, and has been in charge of said action for deponent's office since early 1961.

That this action was brought by the plaintiff to enforce four mechanics liens upon property in the Town of Niagara, Niagara County, New York, as described in detail in the complaint of said plaintiff. Being an action for lien fore-

closure Kozdranski joined as parties defendant all other parties asserting liens or interest in the premises. These parties included American Houses, Inc. and Ray Burroughs, who in their answers to the complaint also asserted liens against the property. Beside demanding lien foreclosure, personal judgment against defendant Anthony P. Miller, Inc. was requested by plaintiff and the two said defendants.

This action came on for trial before Honorable John S. Marsh of this Court on April 16th, 1962 and resulted in a Judgment under date of August 23rd, 1962 enforcing said liens in favor of plaintiff and defendants American Houses, Inc. and Ray Burroughs.

This Judgment, and Order filed September 24th, 1962 were appealed to the Appellate Division, Fourth Department, which Court affirmed the Judgment and Order of the Lower Court without opinion. A motion was made to the Appellate Division for leave to appeal to the Court of Appeals, and this motion was denied without opinion on January 15th, 1964. A further motion was made to the Court of Appeals for leave to appeal to said Court, and this motion was denied in a Judgment dated May 11th, 1964.

By Show Cause Order dated June 5th, 1964, a motion was made to this Court for a stay of execution of the outstanding Judgments on the ground that it had recently come to our attention that there are Statutes forbidding a foreclosure action in the situation involved in this case and hat therefore the New York Courts are complefely without jurisdiction to render the Judgments which are presently on record. The motion was heard this Court on June 11th,

1964, and the merits of the jurisdictional issues were argued before the Court, which denied our motion for stay of execution on the ground that these matters were "*res adjudicata*".

It appears therefore that our sole means of raising the jurisdictional questions is by Certiorari to the United States Supreme Court, since our State remedies seem to have been exhausted. We are presently preparing an application for Certiorari pursuant to Section 2101 (c) of title 28 U. S. C. A., and are by this motion applying for a stay of execution pursuant to Sub-Section (f) of the same Section. Deponent is sincerely of the opinion that substantial Federal questions are involved in this case which deserve review by the Supreme Court, particularly as follows:

1. The Judgment in this case, in form at least, orders foreclosure of liens against property admittedly owned by the Government of the United States. Although the liens have been bonded off, this does not change the essential nature of the action or give the plaintiff any additional rights. *Spitz v. Brooks*, 210 App. Div. 438; *Van Den Driesch v. Rohrig*, 45 App. Div. 526; *Parsons v. Moses*, 48 App. Div. 58; *Pittsburg Plate Glass v. Vanderbilt*, 143 N. Y. S. 609.

2. The United States Government cannot be sued for foreclosure of real property owned by it. *United States vs. Ansonia Brass & Copper Co.*, 218 U. S. 452, 54 L. Ed. 1107, 31 S. C. 49. The only Statute under which the United States has consented to be sued in a lien foreclosure case is 26 U. S. C. A. 2410 which limits it to situations where the United States has a lien against property, and

requires certain formalities which were obviously not followed in this case.

3. The sole remedy available to the claimants under the facts involved in this case is by an action on the payment bond, as prescribed by the Capehart and Miller Acts. The obvious purpose of those Statutes was to prescribe the procedure to be followed by laborers and material men on Government projects where the assertion of liens is forbidden because of the immunity of the United States from such suits. *National State Bank of Newark v. Terminal Construction Corp.*, 317 Fed. Sup. 341; *United Pacific Co. v. United States*, 319 Fed. 2d 893.

4. The Capehart and Miller Acts grant no jurisdiction to the State Courts in such cases, but instead the laborers and material men must bring their actions in the United States District Court. *Travis Equipment Co. v. D & L Construction Co.* (Nov. 1963), 224 Fed. Sup. 410, at 417; *Gypsum Contractors, Inc. v. American Surety Co.*, 37 N. J. 315, 181 A. 2d 174.

The Courts in New York State have upheld the procedure followed by the plaintiff and the other lienors. It is our contention that this procedure is totally outlawed by the Statute under which this project was let, and by the admitted immunity of the United States Government from actions of this type.

At the very least, we feel that Justice requires that we be given a stay of execution with appropriate security to the judgment creditors as directed by the Court, until the Supreme Court of the United States has determined whether or not it wishes to review what has been done in this case.

WHEREFORE, deponent prays that an order be made directing that execution under the Judgments, and that any other steps to enforce these Judgments be stayed until the determination of our application for Certiorari and that the substitution of appropriate bonds in the amounts to be determined by the Court for the appeal bonds now on file be permitted.

FRANK G. GODSON.

Sworn to before me this
12th day of June, 1964.
Mary C. Lewis,
Notary Public, Erie County.
My Commission Expires 3/30/65.

Office-Supreme Court, U.S.
FILED
SEP 18 1964
JOHN F. DAVIS, CLERK

IN THE

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OCTOBER TERM, 1964

No. 368

ANTHONY P. MILLER, INC., and NEW AMSTERDAM CASUALTY CO.,

Petitioners,

v.

WALTER S. KOZDRANSKI CO., INC., AMERICAN HOUSES, INC. and RAY BURROUGHS,

Respondents.

REPLY TO BRIEF IN OPPOSITION

It is said in opposition that at no time in the courts below was a federal question asserted.

(1) As to the validity of the liens, the question was initially specifically placed in issue in the answer filed by the United States Attorney who demanded (R. 81) that the project premises be declared "free and clear of any mechanics' lien or other interest of the plaintiff." That aside, the trial court expressly ruled that the project, while constructed for the Air Force, was built under the Capehart Act "and was therefore technically not a public improvement." (R.19). Accordingly, the issue whether this housing project was a "public work" (an

obviously federal question) was expressly passed on and hence is eligible for review here even in the absence of its having been raised by the pleadings. *Whitney* v. *California*, 274 U.S. 357, 360-361.

(2) As to the point that the exclusive remedy, in the light of the federal disputes clause in the contracts, is before the contracting officer, this was raised repeatedly at the trial. (R. 132-3, 140, 311-12, 425-6; and see 732-3, 793).[1] It was expressly passed upon by the trial court where the contracting officer's decision was unfavorable to petitioner. (R. 22-24).[2] The point was renewed in the Appellate Division, Appellant's Brief, pages 11-15, 29, 59-60, 117.

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[1] The following quotations are from the transcript of the trial, and reflect examples where petitioner's attorney did raise the finality of the contracting officer's decision:

> ". . . we were bound by the contracting officer's decision, and Mr. Kozdranski, we feel, was also bound." (R. 132) "It [the prime contract] provided that the contracting officer's determination shall be final . . ." (R. 133) "And here again, as shown by the contract, we have our friend, the contracting officer, who made the determination." (R. 140) ". . . I would like to move to dismiss the fourth cause of action . . . [T]he decision of the contracting officer, which was to the effect that the matter is not to be paid for as an extra, is controlling as of this date." (R. 311-12) ". . . I move to dismiss the cause of action stated by American Houses . . . [T]here were back charge notices sent in, some . . . of which were apparently based on the contracting officer's inspections decisions." (R. 425-6)

[2] The trial court said "A determination was made on appeal that such rock removed was properly chargeable as an extra. The general contract makes such decision final and conclusive and therefore . . . plaintiff [Kozdranski] is entitled to recover . . . ." (R. 23)

Immediately following, the trial court refused to make the same holding on another claim where the contracting officer had ruled *for* petitioner, on the ground that the disputes appeal machinery was still pending. The court thus disregarded the contracting officer's ruling and made a de novo ruling *against* petitioner. (R. 23-4)

The assertion that there is a state ground of decision adequate to support the judgment is likewise untenable. This is said to arise because judgments *in personam* were claimed as alternatives to the enforcement of the liens. This alternative did not come about since the liens were enforced, the court expressly finding as to each respondent that "the plaintiff has valid liens against the property in suit which may be enforced by judgment against the defendants [petitioners]. . . ." (R.28, Fol. 83; R. 35, Fol. 105; R. 40, Fol.120). That aside, it would be no more fitting to evade the exclusive remedy set up by federal statute through a suit *in personam* than it would by suit *in rem*, and the point is no more a "state" ground of decision than the one actually adopted by the trial court.

The suggestion (Opp. p. 5) that no issue was involved before the contracting officer which concerned respondents and that these were simply disputes between the prime contractor and subcontractors in which the United States had no interest is belied by the fact that the performance of the contract—the compliance with plans and specifications—is of the very essence of the contracting officer's concern and that of the United States. The disputes arose as a result of the rejection of work and materials by the contracting officer—not as the result of some dispute between the contractor and the subcontractors. Clearly the contracting officer was more than a mere arbitrator.

Since scant attention is paid in the brief in opposition to conflicts with the decisions of circuit courts of appeals which we set forth in the petition, we feel those conflicts speak for themselves in showing the necessity for this Court's exercise of jurisdiction.

Respectfully submitted,

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